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A Wife's Action for Loss of Consortium Due to Negligence

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the fourth amendment is taking, namely, that it is part of the fourteenth amendment and completely binding upon the states regardless of the facts involved or the evidence rules being employed in the case[50]—and it would seem that only then will the Court secure the vitality of the fourth amendment for the individual against oppressive and authoritarian behavior.

[50] It should be noted that there are four basic circumstances in which this issue can be brought before the Court. First, there is federal evidence admitted into a federal court; second, there is state evidence admitted into a state court; third, state evidence admitted into a federal court; and fourth, federal evidence admitted into a state court proceeding. As noted above, all evidence illegally seized in the first two instances would be excluded and in the third instance, would have to be excluded if brought on appeal to the federal level. As yet, no determination as to the admittance of evidence obtained illegally by federal officials into a state trial has been rendered by the Court. In People v. Fiorito, 19 Ill. 2d 246, 166 N.E. 2d 606 (1960), such a determination can be reached. A petition for writ of certiorari has been filed. 29 U.S. L. WEEK 3077 (U.S. Sept. 20, 1960) (No. 320). By the Court's own words, such evidence would be excluded if the writ is granted, for the "test is one of federal law." Since, however, this is an Illinois case and Illinois has adopted the exclusionary rule, the Court, if they are to grant the writ, will have to re-examine the facts of the case in order to determine if such evidence was illegally obtained or not. It is questionable that they will grant the writ, however, since the Illinois Supreme Court has already applied the exclusionary rule and has determined that the evidence in question was not illegally seized.

A WIFE'S ACTION FOR LOSS OF CONSORTIUM DUE TO NEGLIGENCE

Whether a married woman may sue for loss of the consortium of her husband, due to his injury by the negligent act of a third party, presents a challenging question to the legal profession. Directly involved is the basic feature of the Anglo-American legal system, the doctrine of stare decisis. Also involved is the sociological concept of the law, *i.e.*, the concept that the law is, and reflects, the prevalent common concepts of civilized society. It is the clash of these two doctrines which presents the challenge. The aforegoing is not meant to give the impression, however, that the law as to the wife's right to sue is unclear in any particular jurisdiction. Such is not usually the case. Rather the opposite is true, and the jurisdictions which have decided the point are quite definite as to what they hold. The challenge is in reality national in scope. The movement of American courts to a new view demanded by the times we live in, as opposed to clinging to well established concepts of the law—this is the challenge. Which side of the issue a lawyer might take at a particular time would depend on whether he represented the wife or the defendant, for neither side lacks arguments. This paper's purpose is to trace the develop-

ment of the wife's right to sue and to thereby show the state of the law today.

CONSORTIUM DEFINED

Essential to an understanding of whether a wife has an action for lost consortium due to negligent injury of her spouse by the defendant, is an understanding of what is meant by consortium. Often what a court defines and designates as the elements of consortium determines whether the wife may maintain her action.[1] At common law, a husband had a right to the services and labor of his spouse and could sue for damages personal to himself when she was injured. He could recover for the expenses of her treatment and for his loss of her labor, services, and consortium.[2] The enforcement of these rights led to confusion as to exactly what constitutes the elements of consortium. This confusion is attributed to the use of words. Pleadings at common law were redundant. Thus when seeking to enforce the husband's right to recover for injuries to his wife, the pleadings alleged loss of services, conjugal affection, companionship, etc. However, no distinct functions were intended. Rather, another example of the redundancy of common law pleadings was created.[3]

In *Valentine v. Pollak*[4] consortium is defined as:

> a property right growing out of the marriage relation and includes the exclusive right to services of the spouse and these contemplate not so much the wages or reward earned as assistance and helpfulness in the relations of conjugal life according to their station and the exclusive right to the society, companionship, and conjugal affection of each other.[5]

Recognizing that consortium has various elements, but denying that they may be distinguished is the case of *Hitaffer v. Argonne Co.*[6] *Hitaffer* defines consortium by saying: "[A]lthough it embraces within its ambit of meaning the wife's material services, [it] also includes love, affection, companionship, sexual relations, etc., *all welded together into a conceptualistic unity*."[7] Thus it can be seen that the meaning of consortium is changing, and it can thereby be deduced that actions for its loss are changing.

[1] For detailed analysis of definition see Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923).

[2] Feneff v. New York Cent. & H.R.R., 203 Mass. 278, 89 N.E. 436 (1909).

[3] Hitaffer v. Argonne Co., 183 F. 2d 811 (D.C. Cir. 1950), citing, at 814, Lippman, The Breakdown of Consortium, 30 COLUM. L. REV. 651 (1930).

[4] 95 Conn. 556, 111 Atl. 869 (1920).

[5] *Id.* at 561, 111 Atl. at 872.

[6] 183 F. 2d. 811 (D.C. Cir. 1950).

[7] *Id.* at 814. (Emphasis added.)

DEVELOPMENT OF THE ACTIONS FOR LOSS OF CONSORTIUM[8]

At early common law, the only member of the family deemed harmed by an unjustified disturbance of the family relationship was the head of the family.[9] The husband had an action for injuries to his wife. Blackstone points out:

> [I]f the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a separate remedy by an action of trespass, . . . for this ill usage, *per quod consortium amisit*, in which he shall recover a satisfaction in damages.[10]

An early case illustrating this right of the husband at common law was *Guy v. Livesey*.[11] Note that the husband's action was *per quod consortium amisit*, not *per quod servitum amisit*, in other words for loss of consortium, and not of services. At this period of the common law the wife had no action whatsoever for any interference with the marriage, family relations, or injury to her husband.[12] The reason for this, as explained by Blackstone, was "[T]he inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury."[13]

From the action in trespass, the actions for criminal conversation and alienation of affections developed. The wife was denied such actions, however, because she had no standing in court without her husband's joining in the action. There are some fine distinctions between the actions for alienation of affections and criminal conversation which, in a full analysis of the subject, would be of great significance. However, this paper's purpose would not be aided by such an analysis in that here there is sought merely a cursory study of the actions and their relationship to the action by a wife for a negligent injury to her husband.

The husband's action for loss of his wife's consortium due to negligence of a third party can be traced to the case of *Newberry v. Connecticut & P. R.R.*[14] In *Newberry* a town was suing to recover damages it had incurred because it was held liable for injuries caused by faulty roads. It seems that when one Abel Willard and his wife were injured when their

[8] For a detailed discussion of this topic see Lippman, *supra* note 3.

[9] Hoekstra v. Helgeland, 98 N.W. 2d 669 (S.D. 1959).

[10] 3 BLACKSTONE, COMMENTARIES 140 (12th ed. 1794).

[11] 79 Eng. Rep. 428 (1619).

[12] 3 BLACKSTONE, *op. cit. supra* note 10, at 143.

[13] *Ibid.*

[14] 25 Vt. 377 (1853).

wagon overturned because of a hole in the road, Willard sued the town for his own injuries and also, in a subsequent action, for loss of his wife's services. The town was held liable in both cases and sought to recover from the railroad, which was responsible for the faulty condition of the road. The court found for the plaintiff, pointing out that the first action by Willard was not a bar to his second action because they were distinct from each other. A somewhat clear statement of the husband's right to recover for the loss of the services and society of his wife because of a third party's negligence appears in *Skoglund v. Minneapolis St. Ry.*[15] There the court said:

> In an action for injury to himself all he needed to show, in order to recover nominal damages at least, was the negligence of the defendant and the consequent injury to himself. But proof of the negligence and injury to the wife would not sustain the husband's action in this case. The cause of action which those facts alone show belongs to the wife. Those facts go to make up the husband's cause of action but alone they are not enough. In addition to them there must exist the fact that, by reason of the injury so caused, he has been deprived of her society or services, or has been put to expense. Such loss is the substance of his cause of action.[16]

EFFECT OF THE MARRIED WOMEN'S ACTS

The law remained basically the same until the passage of the Married Women's Acts by the various states. These acts presented the problem of determining whether the wife now, as a *femme sole*, had an action for loss of her husband's consortium, or whether on the other hand, as a result of her having equal status in the eyes of the law, the husband would be denied his action for loss of her consortium, resulting in *neither* having an action for such loss. Most of the states extended to the wife the right to sue for alienation of affections.[17] These states felt that the wife was the equal of her husband and that her right to his companionship had the same legal standing as his right to her companionship: If the husband's right received the protection of the law, then the wife's right was entitled to the same protection. Maine was one state which refused to extend the action to the wife on the ground that the action did more harm than good. It was, in the opinion of the Supreme Court of Maine, an action of revenge rather than an action for compensation.[18] The wife's right to

[15] 45 Minn. 330, 47 N.W. 1071 (1891).

[16] *Id.* at 331, 47 N.W. at 1071.

[17] *E.g.*, Weber v. Weber, 113 Ark. 471, 169 S.W. 318 (1914); Work v. Campbell, 164 Cal. 343, 128 Pac. 943 (1913); Fort v. Card, 58 Conn. 1, 18 Atl. 1027 (1889); Betser v. Betser, 186 Ill. 537, 58 N.E. 249 (1900); Beach v. Brown, 20 Wash. 266, 55 Pac. 46 (1898); Hodgkinson v. Hodgkinson, 43 Neb. 269, 61 N.W. 577 (1895); Burch v. Goodson, 85 Kan. 86, 116 Pac. 216 (1911).

[18] Howard v. Howard, 120 Me. 479, 115 Atl. 259 (1929).

bring an action for criminal conversation was also denied by Maine.[19] However, many states did not agree with Maine, and allowed the wife to maintain an action for criminal conversation.[20] Thus it might be concluded that, for the most part, there was little if any reticence by the states in extending these actions to the wife. Some of the states have subsequently eliminated or limited these actions through the so-called Heart Balm Acts,[21] but an analysis of these statutes would serve no purpose here.

WIFE'S ACTION FOR LOSS OF CONSORTIUM

The first court to defect from the view that a wife could not sue for loss of consortium due to her husband's negligent injury by a third party was the Supreme Court of North Carolina. In *Hipp v. E. I. DuPont De Nemours & Co.*,[22] the court decided that the action arose from the nature of the relationship created by marriage, as recognized by the state constitution, and the laws derogating the common law as to the status of a married woman. The court also pointed out that the wife could sue for criminal conversation and alienation of affections. The *Hipp* case further points out that the wife's action was for her personal damage which she suffered as a direct consequence of the injury to her husband. The holding of the *Hipp* decision had a rather short life however; four years later North Carolina reversed the *Hipp* case. In *Hinnant v. Tide Water Power Co.*,[23] the North Carolina Supreme Court held that neither the husband nor the wife had an action for loss of consortium due to negligence. In *dictum* the husband was held to have lost his action by the Married Women's Act. The court then stated that the wife had no such action at common law, and had not acquired it by statute. The wife's action was struck down with strong language when the court said:

> After diligent research, we have failed to find a single decision [apart from the intimation in *Hipp* v. *DuPont*, . . .] which approves the wife's right to recover damages for the loss of consortium, under the circumstances appearing in the instant case, and to sanction such a right of recovery would be tantamount to the recognition of a doctrine uttterly at variance with the most enlightened judicial opinion prevailing in other jurisdictions.[24]

[19] Doe v. Roe, 82 Me. 503, 20 Atl. 83 (1890).

[20] *E.g.*, Parker v. Newman, 200 Ala. 103, 75 So. 479 (1917); Scott v. O'Brien, 129 Ky. 1, 110 S.W. 260 (1908); Nolin v. Pearson, 191 Mass. 283, 77 N.E. 890 (1906); Seaver v. Adams, 66 N.H. 142, 19 Atl. 776 (1890); Rott v. Goehring, 33 N.D. 413, 157 N.W. 294 (1916).

[21] *E.g.*, MICH. COMP. LAWS §§ 551.301-555.311 (1948); ILL. REV. STAT. ch. 68, §§ 34-40, 41-47 (1959).

[22] 182 N.C. 9, 108 S.E. 318 (1921).

[23] 189 N.C. 120, 126 S.E. 307 (1925).

[24] *Id.* at 128, 126 S.E. at 307.

THE LANDMARK CASE

Hitaffer v. Argonne Co.[25] was the next case allowing the wife to sue for the loss of consortium caused by the negligent injury of her husband. The husband was injured while at work and the wife brought an action for the damages she suffered thereby. The action was allowed despite the exclusiveness of remedy provision in the Longshoremen and Harbor Workers' Compensation Act,[26] which pertained to the injury. Though the holding in *Hitaffer* as to the exclusiveness of the remedy has been reversed,[27] the decision remains the landmark case as to the wife's right of recovery for loss of consortium for a negligent injury to her husband. *Hitaffer* carefully analyzes the reasons used to deny the wife's action, and finds fault with each. Judge Clark, writing the court's highly scholarly opinion, states that one group of cases base their decisions denying the wife recovery on the fact that in cases of lost consortium resulting from negligence, the services element is the predominant factor for which compensation is given.[28] With this as the common premise these cases conclude by stating that since the wife has no right as such to her husband's services, she cannot recover for the loss of the services, but the husband can still recover because he has always been entitled to his wife's services;[29] or they say that the Emancipation Act, by giving the wife a right to the fruits of her own labors, has destroyed the husband's action.[30] These cases were rejected by the court because the premise that services were the predominant factor was considered false. The court felt that the separation of the elements of consortium was arbitrary, and was devised to circumvent allowing the wife recovery.

The second group of cases attacked in the *Hitaffer* case also appears to place principal emphasis on the element of services. They hold that the wife has no cause of action for loss of consortium, since because the husband, who has the duty of supporting his wife, recovers in his own action for the loss of his ability to fulfill his duty, the wife thereby also recovers for the value of her lost consortium. Thus, these cases hold, any

[25] 183 F. 2d. 811 (D.C. Cir. 1950).

[26] 33 U.S.C.A. § 905 (Supp. 1959).

[27] Aubrey v. United States, 254 F. 2d. 768 (D.C. Cir. 1958).

[28] *E.g.*, Marri v. Stamford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911).

[29] Boden v. Del-Mar Garage, 205 Ind. 59, 185 N.E. 860 (1933); Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912); Stout v. Kansas City Term Ry. Co., 172 Mo.App. 113, 157 S.W. 1019 (1913).

[30] Marri v. Stamford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911); Bolger v. Boston Elevated R.R., 205 Mass. 420, 91 N.E. 389 (1910); Harker v. Bushouse, 254 Mich. 187, 236 N.W. 222 (1931); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E. 2d. 611 (1945).

other result would create double recovery. The husband, however, is allowed his action because the wife has no duty to support him, and if he had no action he could not recover his loss caused by the injury to his wife.[31] As it did with the first group, the *Hitaffer* court rejected these cases on the ground that the emphasis on the element of service was improper. This is an appropriate time to recall the earlier remark in this paper that the original actions in this field were actions *per quod consortium amisit* rather than *per quod servitum amisit*, because such an observation seems to support the thinking in *Hitaffer*. The danger of double recovery is rejected by the court on the ground that if the compensation the husband receives in his action is taken into account in awarding the wife's damages, the possibility of double recovery is eliminated.

The third group of cases criticized in *Hitaffer* recognized that the sentimental elements of consortium are also damaged by negligent torts, but in order to deny the wife's action these courts reasoned in one of four ways: (1) In negligence cases recovery is to compensate for the *direct* consequences of the act and the injury to the wife is *indirect*;[32] (2) the wife's injuries are too remote and consequential to be capable of measure;[33] (3) at common law there was no action for the sentimental elements of consortium, and the wife has not been given any new action by statute;[34] and (4) no cause of action for lost consortium was ever allowed without some showing of loss of services, and the wife cannot show such a loss.[35] The court expressed doubt as to the logic in these cases. The theory that the injury to the wife was too indirect was summarily dismissed by observing that the same is true in the husband's action, but his action is allowed. The cases holding the wife's injury too remote were rejected because the jurisdiction was committed to the rule that unless there was an intervening cause, any injury, which but for the negligence would not have occurred, was actionable. As in dismissing

[31] Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462 (1918); Eschenbach v. Benjamin, 195 Minn. 378, 263 N.W. 154 (1935); Giggey v. Gallagher Transp. Co., 101 Colo. 258, 72 P. 2d 1100 (1937).

[32] Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912); Feneff v. N.Y. Cent. & H.R.R., 84 Conn. 9, 78 Atl. 582 (1911); Goldman v. Cohen, 30 Misc. 336, 63 N.Y.S. 459 (1900); Howard v. Verdigris Val. Elec. Co-op., 201 Okla. 504, 207 P. 2d 784 (1949); Kosciolek v. Portland Ry., Light & Power Co., 81 Ore. 517, 160 Pac. 132 (1916); McDade v. West, 80 Ga. App. 481, 56 S.E. 2d. 299 (1949).

[33] Feneff v. N.Y. Cent. & H.R.R., 84 Conn. 9, 78 Atl. 582 (1911); Stout v. Kansas City Term. Ry., 172 Mo. App. 113, 157 S.W. 1019 (1913).

[34] Feneff v. N.Y. Cent. & H.R.R., *supra*. note 33; Stout v. Kansas City Term. Ry., *supra* note 33.

[35] Boden v. Del-Mar Garage, 205 Ind. 59, 185 N.E. 860 (1933); Feneff v. Cent. & H.R.R. Co., 84 Conn. 9, 78 Atl. 582 (1911).

the cases holding that injury to the wife was indirect, the court pointed out that if the wife could not bring her action because her injury was too remote, the husband should be denied his action on the same basis. Denying the action because the common law did not recognize the sentimental elements of consortium, or because some loss of services had to be shown and the wife could not show any, were rejected because these theories lacked precedent: Husbands had been allowed to sue for criminal conversation where there was no loss of services and the only bases of recovery were the sentimental elements of consortium.

The last theory used to deny the wife's right to sue which was attacked by *Hitaffer* was the theory that the wife had no property interest in the marriage, and her interest was not derived from a contract of bargain and sale. Therefore, these courts held that the law will not enter such cases except in instances of necessity.[36] This reasoning was rejected because of the District of Columbia was committed to a different rule, namely, that marriage creates equal and mutual rights and obligations for the husband and wife.

Hitaffer did not meet an early demise as did the *Hipp* case. In fact, the *Hitaffer* decision became the cornerstone of a new movement in the law. At first it was not readily accepted, but once it did receive acceptance, its doctrine gained momentum. Various jurisdictions have granted the wife an action for loss of consortium due to negligence resulting in an injury to her husband.[37]

CONCLUSION

Allowing the wife to recover for her loss of consortium caused by the defendant's negligent injury of the husband is a reflection of modern American civilization. It solves the anomaly created by making the wife the legal equal of her spouse, but denying her the right to bring a cause of action which he, her legal equal, can bring. Denying the action to both spouses also solves the anomaly, and also avoids multiplicity of actions, but it creates the danger that a wrong may be committed for which there is no remedy providing the full compensation to which the family is entitled. The trend started by the *Hitaffer* case fulfills the obligations of the law to provide remedies for wrongs and to adjust to the needs of society.

[36] Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912); Goldman v. Cohen, 30 Misc. 336, 63 N.Y.S. 459 (1900).

[37] Dini v. Naiditch, Nos. 35466 & 35721, Sept. 30, 1960; Montgomery v. Stephan, 359 Mich. 33, 101 N.W. 2d. 227 (1960); Hoekstra v. Helgeland, 98 N.W. 2d. 669 (S.D. 1959); Bailey v. Wilson, 100 Ga. App. 405, 111 S.E. 2d. 106 (1959); Luther v. Maple, 250 F. 2d. 916 (8th Cir. 1958); Missouri Pacific Transp. Co. v. Miller, 227 Ark. 351, 299 S.W. 2d. 41 (1957); Acuff v. Schmit, 248 Iowa 272, 78 N.W. 2d. 480 (1956).